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Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 214

SCHWING MOTOR COMPANY, INCORPORATED,
Petitioner,

v.

HUDSON SALES CORPORATION, HUDSON MOTOR CAR COMPANY, BANKERT HUDSON, INC., MARTIN A. BANKERT, FRANK BURNHAM AND CLAUDE W. MARGETTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This brief is filed on behalf of respondents, Bankert Hudson Inc. and Martin A. Bankert (hereinafter called "Bankert") in opposition to the petition of Schwing Motor Company, Incorporated (hereinafter called "Schwing") for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 25, 1957.

STATEMENT OF THE FACTS

Schwing's Petition under the caption "Statement of the Case" (pp. 5-16) summarizes the allegations of the Amended Complaint. Such summary is substantially correct.

In addition to the allegations of the Amended Complaint the following facts were considered by the Courts below:

1. During the period of the alleged "virtual" monopoly two other Hudson dealers operated within the Baltimore metropolitan area. The existence of these other dealers was expressly conceded by Petitioner in argument in both of the Courts below and is not now denied by Petitioner.[1]

2. Neither Hudson nor Bankert had a dominant position in the manufacture or sale of automobiles in Baltimore or elsewhere and many dealers for other makes of automobiles were located in all parts of Baltimore and its metropolitan area.

Again Petitioner makes no denial of these self-evident facts,[2] but instead argues (Pet. brief p. 37) that "the Hud-

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[1] In now characterizing such dealers as "inconsequential," located "in the outskirts of the metropolitan area" and "not in competition with Bankert" (Pet. brief p. 49) Petitioner is attempting to move into an area of fact which *is* disputed, which is outside the allegations of the Amended Complaint, and which played no part in the decisions of either Court below.

[2] New car registrations of the industry and of Hudsons for the five years 1950-55 are reported by Ward's 1956 Automotive Year Book, 18th Edition at p. 155, as follows:

Year	*Industry*	*Hudson*
1950	6,326,438	134,219
1951	5,060,903	96,847
1952	4,158,394	78,509
1953	5,738,989	66,797
1954	5,535,464	35,824
1955	7,169,908	43,212

son automobile is a specialized superior product which is quite different from, and well recognized to be different from, other automobiles." These unverified statements of counsel are not only disputed, but irrelevant to the real issue (see pp. 6, 7, ante). It is significant that such supposed facts were not alleged in either the original complaint or the amended complaint and that Petitioner at no time has made any application for leave to make such allegations by further amendment.

ARGUMENT

I. The decision of the Court below is not in conflict with the decision of any Court of Appeals.

The disappointed distributor who has lost his franchise to sell a trade marked article and who seeks relief under the anti-trust laws is not an unfamiliar figure in the federal courts. With but one exception all such actions have been unsuccessful.

In each of the cases cited below it was specifically alleged that there was a conspiracy to restrain interstate trade and commerce which resulted in termination of the dealer's franchise. In each case it was held as a matter of law that there had been no violation of the anti-trust laws. *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. C. Md. 1937); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99 (C.C.A. 3, 1946); *Neumann v. Bastian-Blessing Co.*, 71 F. Supp. 803 (D. C. N. D. Ill., 1946); *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (D. C. W. D. Ky., 1949); *Feddersen Motors, Inc. v. Ward*, 180 F. 2d 519 (C. A. 10, 1950); *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F. 2d 911 (C. A. 5, 1952; cert. den. 345 U. S. 925); *Fargo Glass & Paint Co. v. Globe American Corp.*, 201 F. 2d 534 (C. A. 7, 1953; cert. den. 345 U. S. 942); *Hudson Sales Corp. v. Waldrip*, 211

F. 2d 268 (C. A. 5, 1954); cert. den. 348 U. S. 821); *Packard Motor Car Co. v. The Webster Motor Car Co.*, 243 F. 2d 418 (C. A. D. C., 1957).

Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951), is the exception mentioned above, but only to the extent that it represents an instance in which cancellation of a franchise gave rise to a cause of action. The conspiracy upon which this action was based was not to restrain the dealer's trade in General Motors products but, on the contrary, was to control the retail financing of such products throughout the country. *U. S. v. General Motors Corp.*, 121 F. 2d 376 (C.C.A. 7, 1941 cert. den. 314 U. S. 579).

In the instant case the alleged conspiracy was apparently for the purpose of having three Hudson dealers in Baltimore rather than five while in *Packard Motor Car Co. v. Webster Motor Car Co.*, supra, the manufacturer determined to establish a single dealership. That is to say, the alleged conspiracy here was solely concerned with the distribution of the manufacturer's own product in the City of Baltimore. No contention is made that the manufacturer conspired to use its natural control of its own product either to restrain or restrict trade and commerce in competing products or services or to control the sale of other products or services.

The Court of Appeals cases relied upon by Petitioner all involved conspiracies between manufacturers or distributors of competitive products or services to fix prices or to exclude or restrict the business of another competitor. Such authorities are not in conflict with the decision in this case.

II. The decision of the Court below is not in conflict with any decision of this Court.

This Court has consistently held that the anti-trust laws "do not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . ." *United States v. Colgate & Co.*, 250 U. S. 300, 307; 63 L. Ed. 992; 39 S. Ct. 465 (1919); *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U. S. 565, 573; 68 L. Ed. 448; 44 S. Ct. 162 (1924); *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594, 624; 97 L. Ed. 1277; 73 S. Ct. 872 (1953). While it may be conceded that this right is not absolute, the cases in which its exercise has been condemned have been those in which there has been a combination of competitors or other *per se* violation of law.[3] Even where a price fixing conspiracy has been established the Court has been unwilling to deny this right to the offending manufacturer. *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 728; 88 L. Ed. 1024; 64 S. Ct. 805 (1944).

The decisions relied upon by Petitioner of which *Interstate Circuit Inc. v. United States*, 306 U. S. 208; 83 L. Ed. 610; 59 S. Ct. 467 (1939); *United States v. Crescent Amusement Co.*, 323 U. S. 173; 89 L. Ed. 160; 65 S. Ct. 254 (1944); *Eastern States Retail Lumber Dealers Assn. v. United*

[3] In *Lorain Journal v. United States*, 342 U. S. 143; 96 L. Ed. 162; 72 S. Ct. 181 (1951), and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359; 71 L. Ed. 684; 47 S. Ct. 400 (1927), the refusal to sell was to create or perpetuate a monopoly and in *United States v. Schrader's Son, Inc.*, 252 U. S. 85; 64 L. Ed. 471; 40 S. Ct. 251 (1920); *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707; 88 L. Ed. 1024; 64 S. Ct. 805 (1944); and *Federal Trade Commission v. Beech Nut Packing Co.*, 257 U. S. 441; 66 L. Ed. 307; 42 S. Ct. 150 (1922), the refusal was adopted as a means to fix resale prices.

States, 234 U. S. 600; 58 L. Ed. 1490; 34 S. Ct. 951 (1914), are typical, all involved conspiracies by competitors to exclude or restrict the business of a competing concern. None of these authorities consider the issue of an alleged conspiracy solely between a producer and a distributor of its products for the purpose of changing the number of such distributors. Such cases would be in point if it had been alleged here that Hudson, General Motors and Ford had conspired to restrain Petitioner's business, or if it were alleged that Bankert and other competing dealers had conspired either with or without the joinder of the manufacturers to injure Petitioner.

It is not without significance that the Congress, after extensive hearings, deemed it necessary to create a new remedy in favor of automobile dealers against the manufacturers, in an effort to remedy any injustice which might result from franchise cancellations or failures to renew. Act of August 8, 1956 c. 1038, 70 Stat. 1125, 15 U. S. C. 1222-1225.

Finally Petitioner contends that under the decision of the Court in the Cellophane case, *United States v. duPont & Co.*, 351 U. S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956), the relevant market in this case was the market for Hudson automobiles within the City of Baltimore. This argument ignores the "constant" tests that the Court has announced. "That market is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." 351 U. S. 404. "In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control." (351 U. S. 395, 396).

In an attempt to meet these criteria counsel for Petitioner argue that determination of the relevant market is

in all cases an issue of fact and that a Hudson automobile is unique in that it is higher priced, has unspecified safety devices, a specialized type of motor and other undisclosed features. Even these assumptions do not suggest that a Hudson and any other comparably priced automobile are not reasonably interchangeable for the purposes for which they are produced. Indeed, it is a matter of common knowledge that Hudsons have the same use as Buicks, Chryslers, Studebakers and even Cadillacs and Fords.

III. The decision of the Court below does not present an unresolved question of Federal law.

Petitioner's allegations of a "virtual" monopoly which are relied upon as giving rise to a cause of action under Section 2 of the Sherman Act must be tested by the criteria set forth in the Cellophane case, *supra*. In applying such criteria the trial court was entitled to consider the facts alleged and all reasonable inferences to be drawn therefrom. It was not required to operate in a vacuum or shut its eyes to matters of common knowledge. On this issue the applicable legal principles have been authoritatively stated by the Court adversely to Petitioner's contentions.

Although a fair reading of the Amended Complaint shows that the gravamen of Petitioner's charges is the "virtual monopoly" alleged as a violation of Section 2, relief is also sought under Section 1 of the Act. Every court of appeals that has considered the issues raised by the latter theory of recovery has ruled adversely to Petitioner. The Court has denied certiorari in three such cases within the last four years. *Nelson Radio & Supply Co. Inc. v. Motorola Inc., supra; Fargo Glass & Paint Co. v. Globe American Corp., supra; Hudson Sales Corp v. Waldrip, supra*. In each of these cases a distributor whose franchise

was cancelled or not renewed alleged a conspiracy under Sec. 1 of the Sherman Act. In each case it was held as a matter of law that there had been no violation of the anti-trust laws. The decision of the Court below is consistent with all relevant authority.

Reduced to its essentials the Amended Complaint reveals a private controversy which at most charges a common law tort. The key charge against Bankert is that it "induced" Hudson to break the quota contract and to fail to renew the franchise. Such rights as Petitioner may have by virtue of such alleged misconduct were unaffected by the decision of the Court of Appeals. The redress of these alleged wrongs presents no issue of Federal law.

CONCLUSION

For the reasons herein stated these respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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